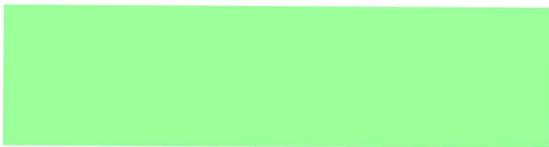




U.S. Citizenship
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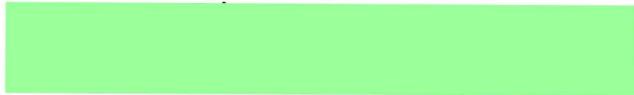


DATE: **APR 11 2013**

Office: CALIFORNIA SERVICE CENTER

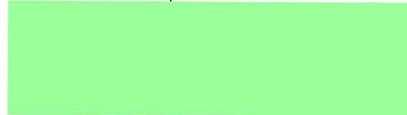
FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which the AAO dismissed. The matter is now before the AAO on a motion to reconsider.¹ The motion to reconsider will be granted. The AAO's previous decision will be affirmed and the petition will be denied.

The petitioner seeks to extend the employment of the beneficiary as its Senior Project Manager (Operational Manager) as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L).² The petitioner, an Arizona limited liability company, engages in the restaurant (casual food) business. It claims to employ thirty employees in the United States and have a gross annual income of \$1,693,165. The beneficiary was initially granted a two-year period of stay in the United States in L-1A status, and the petitioner seeks to extend the beneficiary's stay for an additional five years.³

The AAO dismissed the appeal, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In dismissing the appeal, the AAO found that the petitioner has not consistently identified the beneficiary's job title or duties within the U.S. company. The AAO discussed specific discrepancies regarding the scope of the beneficiary's responsibilities; for instance, the petitioner's initial position description indicated that the beneficiary would have oversight of multiple restaurant locations while being aided by an assistant, while the petitioner's RFE response described the beneficiary as a store manager and indicated that his scope of authority was limited to a single restaurant located at [REDACTED] Tucson, Arizona. The AAO concluded that the beneficiary's duties are primarily administrative tasks such as collecting and recording information for reports and preparing reports, operational tasks such as ordering supplies, inspecting food, and monitoring the store's inventory, and first-line supervisory oversight over the store's cooks, grillers, cashiers, and assistant manager-in-training. Moreover, the AAO concluded that the beneficiary was directly involved in the close supervision of day-to-day operations of the restaurant, instead of having authority to establish broad goals and policies. The AAO concluded that the record was also unclear as to whether the petitioner's documented employees would fully relieve the beneficiary from participation in cooking functions and customer transactions.

The petitioner filed the instant motion to reconsider. On Form I-290B, Notice of Appeal or Motion, counsel for the petitioner asserts that there is "no question" that the beneficiary was employed abroad in an executive capacity, as the beneficiary was chosen to develop the U.S. operation, and the beneficiary was involved with the foreign entity's decision to open the U.S. operations and develop the U.S. market. Counsel also asserts that the beneficiary is employed in an executive capacity in the United States, as he was involved in "developing future operations in Texas and in some other States" and "receives only supervision or direction from the Board of Directors of the Company." Counsel cites to *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990) to support the assertion that the beneficiary is employed in an executive capacity, pointing out that the petitioner employs approximately 25 persons to

¹ On the instant Form I-290B, the petitioner indicated that it is filing an appeal. In the accompanying brief, counsel clarified that the petitioner is filing a motion to reconsider, not an appeal.

² The petitioner has listed a variety of titles for the beneficiary, including Senior Project Manager, General Manager of Operations, Operational Manager, and Store Manager.

³ The petitioner requests to extend the beneficiary's status for an additional five years. However, pursuant to 8 C.F.R. § 214.2(l)(15)(ii), an extension of stay may only be authorized in increments of up to two years.

relieve the beneficiary from performing non-qualifying functions. Finally, counsel asserts that any prior deficiencies in the record are due to “improper representation,” and stresses the importance of the matter to the beneficiary and his family.

8 C.F.R. § 103.5(a) states, in pertinent part:

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy

The instant motion meets the requirements of 8 C.F.R. § 103.5(a) concerning the proper filing of a motion to reconsider. The petitioner has stated the reasons for why it requests reconsideration of the prior decision, and cites to *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 to support its motion. Accordingly, the request to reconsider these proceedings will be granted.

Upon review of the record, the AAO will affirm its previous decision to dismiss the appeal. The petitioner failed to establish that the AAO erred in dismissing the appeal.

In dismissing the appeal, the AAO discussed specific discrepancies regarding the scope of the beneficiary’s responsibilities, and concluded that the petitioner has not consistently identified the beneficiary’s job title or duties within the U.S. company. On motion, counsel does not address or submit any documentary evidence to reconcile the discrepancies. As such, the AAO will continue to rely on the organizational chart depicting the beneficiary as a store manager with limited oversight over a single restaurant.

In dismissing the appeal, the AAO concluded that the beneficiary’s duties are primarily non-qualifying in nature, as he primarily performs administrative, operational, and first-line supervisory functions. The AAO also questioned whether the petitioner’s documented employees would fully relieve the beneficiary from participation in cooking functions and customer transactions. On motion, counsel asserts that the beneficiary is employed in an executive capacity in the United States, as he was involved in “developing future operations in Texas and in some other States” and “receives only supervision or direction from the Board of Directors of the Company.” Counsel also asserts that the petitioner’s approximately 25 employees relieve the beneficiary from performing non-qualifying functions.

Counsel’s assertions fail to establish that the beneficiary is employed in a primarily executive capacity. Counsel does not directly address or dispute the AAO’s finding that the beneficiary’s duties are primarily non-qualifying in nature, as he primarily performs administrative, operational, and first-line supervisory functions. Counsel’s assertion that the beneficiary was involved in developing the U.S. operations and receives only supervision or direction from the Board of Directors of the Company, alone, is insufficient to prove that the beneficiary is employed in a primarily executive capacity. Counsel failed to provide any details or supporting evidence to establish exactly what duties the beneficiary performs in furtherance of developing the U.S. operations, and how much of the beneficiary’s time is spent on such duties. Without any details regarding the beneficiary’s actual daily duties in support of developing U.S. operations and how much time is spent on these actual duties, the AAO is unable to determine whether the beneficiary’s actual duties are primarily qualifying or non-qualifying in nature. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature; the actual duties themselves reveal the

true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Similarly, counsel's assertion that the beneficiary receives only supervision or direction from the Board of Directors of the Company provides no insight as to what the beneficiary actually does on a daily basis. Counsel failed to refute the AAO's findings that the beneficiary spends the majority of his time performing non-qualifying, administrative, operational, and first-line supervisory functions.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner failed to establish this second essential element of eligibility.

Counsel's bare assertion that the petitioner's approximately 25 employees relieve the beneficiary from performing non-qualifying functions is insufficient to establish that the petitioner's documented employees fully relieve the beneficiary from participation in cooking functions and customer transactions. Counsel failed to provide any details and supporting evidence to establish the existence of these 25 claimed employees at the particular restaurant where the beneficiary works, including their names, job titles, and job duties. To the contrary, the petitioner previously claimed to employ thirteen employees at the restaurant location where the beneficiary works, only nine of which the petitioner actually documented as employed there at the time of filing. Counsel offered no explanation or evidence to reconcile the discrepancies regarding the restaurant's staffing.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). See also *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984).

On motion, counsel asserts that there is "no question" that the beneficiary was employed abroad in an executive capacity. However, even if the beneficiary were employed abroad in an executive capacity, this does not automatically establish that the beneficiary is employed in an executive capacity in the United States. The petitioner failed to establish that the beneficiary is employed in a primarily executive or managerial capacity in the United States, regardless of his employment capacity abroad.

Finally, the AAO acknowledges counsel's assertions regarding the petitioner's claimed prior "improper misrepresentation" and the importance of this matter to the beneficiary and his family. However, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed

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of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Counsel fails to provide any of the above required evidence supporting the claim of prior improper misrepresentation. Further, the fact that this matter is important to the beneficiary and his family is of no relevance to the question of whether the beneficiary is eligible for the benefit sought. For the foregoing reasons, the petitioner failed to establish that the beneficiary is employed in a primarily executive or managerial capacity in the United States, and that the AAO erred in dismissing the appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The AAO's decision, dated June 19, 2012, is affirmed. The petition remains denied.